

No. 10190

IN THE  
United States  
Circuit Court of Appeals<sup>2</sup>  
For the Ninth Circuit

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STERLING CARR, as Trustee in Bankruptcy  
of NIPPON YUSEN KABUSHIKI KAISYA,  
a Corporation, Bankrupt, and FIDEL-  
ITY AND DEPOSIT COMPANY OF MARY-  
LAND, a Corporation,

*Appellants,*

vs.

HERMOSA AMUSEMENT CORPORATION, LTD.,  
a Corporation, and J. M. ANDERSEN,  
*Appellees.*  
(And Fourteen Consolidated Appeals.)

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APPELLANTS' OPENING BRIEF

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LILLICK, GEARY, McHose & ADAMS,  
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*Proctors for Appellants.*



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APPELLANTS' OPENING BRIEF

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STATEMENT OF FACTS.

A. Preliminary—San Pedro Bay.

San Pedro Bay is an arc-like indentation in the coast line of Southern California. For the purpose of determining the territorial limits of California, the chord of this arc has been judicially determined to be a line drawn from Point Fermin, its northwest extremity, to Point La-

suen, distant some sixteen miles to the southeast. The portion of the shore line formerly known as Point Lasuen is the present site of the city of Huntington Beach.

*United States v. Carrillo* (1935), 13 F. Supp. 121 (S.D.Cal.);

*People v. Stralla* (1939), 14 Cal.(2d) 617, 621, 91 Pac.(2d) 941.

In the northwesterly segment of these waters, lying landward from the line between Point Fermin and Point Lasuen, there have been constructed the facilities of Los Angeles harbor, consisting, so far as of interest herein, of a western breakwater, a harbor entrance, and an easterly breakwater extension. It is classic learning that, in its natural state, the Bay of San Pedro in the vicinity of the present harbor afforded little protection to the mariner. Thus, writing of times more than a century ago in

*Two Years Before the Mast*—Everyman's Edition, pages 78, 79,

Richard Henry Dana said of this locality:

“Leaving Santa Barbara, we coasted along down, the country appearing level or moderately uneven, and, for the most part, sandy and treeless; until doubling a high sandy point, we let go our anchor at a distance of three or three and a-half miles from shore. It was like a vessel bound to St. John's, Newfoundland, coming to anchor on the Grand Banks; for the shore being low appeared to be at a greater distance than it actually was, and we thought we might as well have stayed at Santa Barbara, and sent our boat down for the hides. \* \* \* No sooner had we come to anchor, than the slip rope,

and the other preparations for southeasters, were got ready; and there was reason enough for it, for we lay exposed to every wind that could blow, except the northerly winds, and they came over a flat country with a rake of more than a league of water."

The tide in the affairs of this locality which was destined to convert a portion of San Pedro Bay into one of the commercially practicable, busiest and most important harbors of the Pacific, commenced to run long before the turn of the century, for the same writer, in

*Twenty-four Years After* (id. p. 321),

dealing with conditions in 1859, wrote:

"The next morning, we found ourselves at anchor in the Bay of San Pedro. Here was this hated, this thoroughly detested spot. Although we lay near, I could scarcely recognize the hill up which we rolled and dragged and pushed and carried our heavy loads, and down which we pitched the hides, to carry them barefooted over the rocks to the floating long-boat. It was no longer the landing place. One had been made at the head of the creek, and boats discharged and took off cargoes from a mole or wharf, in a quiet place, safe from the southeasters. A tug ran to take off passengers from the steamer to the wharf—for the trade of Los Angeles is sufficient to support such a vessel."

In these exposed waters a little seaward of the line defining San Pedro Bay, after daylight on the morning of September 4, 1940, the fishing barge *Olympic II* lay some three miles in a direction approximately  $159\frac{1}{2}^{\circ}$  true from Los Angeles lighthouse, which is located at the eastern

end of the westerly breakwater marking the harbor entrance. She was there run into, in a fog, and sunk by the appellant's motorship Sakito Maru. Seven or eight lives were lost, personal injuries claimed, and there was also considerable property damage and loss. In the ensuing litigation before the District Court from which this appeal is taken, the Sakito Maru was held solely at fault with damages to be ascertained.

#### **B. The Two Vessels.**

The Olympic II was a former sailing ship, built of iron at Belfast, Ireland, in 1877, and converted a few years before the collision here involved into a fishing barge. (Ap. I, pp. 349, 350 ) Prior to her conversion, she had been known as the Star of France. (Ap. I, p. 372 ) She was operated commercially by her owners and catered to fishermen who boarded her from shore boats in order to enjoy the fishing. (Ap. I, pp. 407, 408) The vessel was of an over-all length of 279.5 feet, and her beam was 38 feet. Her gross tonnage was 1776, and her net tonnage was 1414. As she lay on the date of the collision, her draft aft was 16.6, and forward 15 feet. (Ap. I, pp. 372-375; Ap. II, p. 740) The vessel was in charge of a "crew" of three men: Ohiser, the night watchman; Greenwood, the shipkeeper; and Culp, the bait boy. Ohiser was certificated as an ordinary seaman the two others so far as appears, held no licenses or certificates. (Ap. I, p. 354) Her open hold was ballasted by 1500 tons of sand and a half dozen concrete blocks of a total weight of about 10 tons. (Ap. I, p. 364)

In order to hold her in a fixed position headed into the prevailing westerly swell, at the time the Olympic II was placed in these waters on May 8, 1940, a 6,000 pound bow anchor on a  $2\frac{1}{4}$ -inch chain was put forward to the west, and a 1200 pound stern anchor on a  $1\frac{1}{4}$ -inch chain was placed aft to the east. The length of chain out forward was 630 feet, and the length of chain out aft was at least 300 feet. The after anchor was marked by a mooring buoy which rode above it. (Ap. I, pp. 355, 382, 383) The vessel was so headed and held in place to protect her customers from seasickness. As so tied up, the axis of the Olympic II might change about a point from her heading of  $270^\circ$  in either direction. (Ap. I, p. 356) The water where the Olympic II lay was approximately 100 feet deep. (Ap. I, p. 379) Other vessels in the vicinity at the time anchored in normal fashion rode to their anchors with stems headed in a general northerly direction. (Ap. I, p. 417; Ap. II, p. 531) The wind came from the northeast and was of force 1 Beaufort scale, or approximately 7 knots per hour. (Ap. II, p. 824) It was stipulated at the trial that it is very frequently foggy in the vicinity of Los Angeles harbor. (Ap. I, p. 411)

Into the hull of this iron vessel of over 60 years of age was built one forward or collision bulkhead located 20 feet abaft her stem. The remainder of her hold, to her stern, was open. (Ap. I, p. 362) She was enrolled and licensed as a barge in 1934 to carry on the coasting trade, and her last consolidated certificate had been taken up over a year before the collision for her failure to have a load line. (Ap. I, pp. 371-374; Ap. II, p. 741) Demands in June of 1940, presented to her owners by the local



inspectors that she comply with certain standards relating, among others, to increased bulkheading of the hull, to the maintenance of a sufficient crew properly officered, and to other safety standards, were met by the objection that the vessel could not operate as a business proposition if such requirements were observed. (Ap. I, pp. 390-400; id. 403) The requirements of the local inspectors were affirmed on appeal. (Ap. II, pp. 744, 745) Such ruling was made more than a month before the accident, but the Olympic II did nothing. When the steel stem of the Sakito Maru, little more than a year and one-half off the ways, struck the ancient iron plates comprising the port ribs of the Olympic II, at a near right angle about amidships, the latter went down with a rapidity approaching that of the ice-stoven Linseed King.<sup>1</sup> With passengers crowding her rail to board the small boat, H-10, the Olympic sank, carrying them with her, in about three and a half minutes. (Ap. III, p. 1138 )

A few hundred feet northerly of the Olympic II, and about in line with her position and inshore of her, lay the Point Loma, another fishing barge similarly tied up. About in line with the Point Loma, and a few hundred yards easterly of her, lay the barge Rainbow, or Samar, similarly headed and engaged in the same calling. (Ap. I, p. 359; Ap. III, p. 987 )

The general locality of the barges is known locally as "Horseshoe Kelp" and as a place where fish are found, but it is not shown on any official chart of these waters,

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(1) (1932) 285 U.S. 502, 52 S.Ct. 450, 76 L.ed. 903.

nor is its presence noted in the Coast Pilot. (Ap. III, p. 1001) The Olympic II's owners took no steps to advise mariners of her location and did not notify the hydrographic office. (Ap. I, pp. 412, 413) "Horseshoe Kelp" is an ill-defined area in the shape of a horseshoe covering perhaps a square mile, and is frequented by fishing vessels. (Ap. I, p. 445; Ap. III, p. 1394) It lies dangerously close to the courses of vessels bound south from Los Angeles harbor, and into Los Angeles harbor from southern ports. (Ap. III, p. 1050; id. pp. 1024-1027; id. p. 1327)

On the morning of September 4, 1940, the Japanese motorship Sakito Maru was inbound to Los Angeles harbor for bunkering. She had come via the Panama Canal from New York and was bound for Yokohama. (Ap. II, p. 805) She was a large cargo vessel then displacing approximately 10,000 tons. (Ap. III, p. 1408) Her length overall was 506.76 feet, and between perpendiculars 465.6 feet. Her breadth was 62.32 feet, and her tonnage 7,126.32 gross and 3900.09 net. (Ap. II, pp. 803, 804) Her bridge was approximately 213 feet aft of her stem, and was some 53 feet above the water. (Ap. II, p. 807) Her forecastle head was 33-34 feet above the water. (Ap. III, p. 1141) She was drawing 27 feet aft and 24 feet 7 inches forward. (Ap. III, pp. 1086, 1087) She was launched in the fall of 1938, and entered upon her first voyage in January, 1939. (Ap. II, p. 803) She was equipped with two 4800 horsepower Diesel engines connected directly to the shafts, and her propellers were twin screws turning outward when she was moving ahead. (Ap. II, p. 807)

### C. Circumstances of the Collision.

At daylight on September 4, 1940, the Sakito Maru had been steering course  $340^{\circ}$  true, as shown by her gyro course recorder, for some hours. This course had been first taken off Benitos Island on September 3d, the position of the vessel checked off Coronado Island, and again checked by several bearings on Santa Catalina Island taken between 5:20 and 6:08 a.m. of September 4th. (Ap. II, pp. 809, 813) The latter bearings showed a departure of about a mile and a quarter from the theoretical position on her navigating chart, and her position was corrected thereon, but her course was not changed. (Ap. II, p. 808; Ap. III, pp. 1189, 1190)

Had the theoretical course from 5:58 a.m. been made good, the Sakito Maru would have passed to the westerly of the Olympic II, but between that time and the time of collision at 7:10½, she had been set over easterly a distance in the neighborhood of one-half mile. (Ap. III, pp. 1188, 9)

At 7:03 a.m. on the morning of the collision, Captain Sato, of the Sakito Maru, who, with her chief officer, an apprentice officer and a quartermaster, were on the bridge, ordered her engines slow ahead and fog signals sounded. (Ap. II, p. 826; Ap. III, pp. 1105, 6) Within three minutes, or by 7:06 a.m., the speed of the vessel was thereby reduced from 16 knots to from  $6\frac{1}{4}$  to  $6\frac{1}{2}$  knots, and her engine revolutions from approximately 118 to 50 revolutions. (Ap. II, pp. 838; id. p. 929) At the time fog signals were sounded, an A.B. sailor went on lookout on the fore-castle head, and just before 7:09 he megaphoned the



presence of a vessel dead ahead. (Ap. II, p. 833; Ap. III, p. 1109) The engines of the vessel were rung stop and immediately thereafter full astern. (Ap. II, p. 826; Ap. III, pp. 1113, 4) Simultaneously her helm was put hard to starboard (Ap. II, p. 841) The Olympic was probably sighted about 200 meters, or something in excess of 200 yards, ahead of the stem of the Sakito Maru, and at the time she was hit, the Sakito's speed was probably one to one and one-quarter knots. (Ap. III, p. 1113; id. p. 1125) The time of the collision is fixed at 7:10½ a.m., and at that time the Sakito had just commenced to alter course to starboard in answer to the helm action taken at 7:09. (Ap. III, p. 1118) All maneuvers of the Sakito Maru were entered in the rough or scrap log as they were made by the apprentice officer. (Ap. III, pp. 1288-90) The time of the collision was logged by the half minute in the smooth log because the apprentice officer had looked at the clock, and the captain, in view of the importance of the time, instructed him to enter it at 7:10½ rather than follow the usual practice. (Ap. III, p. 1126)

No bell from the Olympic II was heard by the lookout (Ap. II, p. 947) or the navigating officers of the Sakito Maru until just before the collision and after they had already sighted her. (Ap. II, p. 842; Ap. III, p. 1114) At the time the bell was heard, it was ringing continuously. (Ap. III, p. 1114)

Each of the fourteen witnesses presented by libelants was examined in court. Five of respondent's witnesses were so examined, and of these only one, Captain Sato, was aboard the Sakito Maru. Her chief engineer, first

officer and lookout testified by deposition, as did three Coast Guard officers. In addition, six brief statements of other Sakito Maru witnesses were received in evidence. Counsel for libelants stipulated that the witnesses would so testify if present in court, and, on the basis of such stipulation, a motion of respondent for a continuance to secure depositions was denied. The developing international situation in mid-September, 1941, when the case was tried, had defeated respondent's expectations that such witnesses' depositions could be presented to the trial court. (Ap. I, pp. 92-96 )

The foregoing statement is designed to give the court a brief resume of what we consider to be the main facts testified to at the trial and the circumstances of the parties and their witnesses. Questions of visibility, signals sounded, and the propriety of the maneuvers of the Sakito Maru are so contentious that we have endeavored to make the foregoing statement sufficiently general to escape criticism. Upon the entire evidence, the trial court, ruling that the Olympic II was not violating any statute and that she was not subject to inspection and regulation by the inspectors, held the Sakito Maru in sole fault for this disaster, and we now detail the reasons why we believe such decree should be either reversed in its entirety or modified to one of mutual fault.

#### **D. Questions Involved.**

The findings of the trial court convict the Sakito Maru of immoderate speed in fog and for inefficient lookout. The Olympic II was absolved of all blame asserted to be incident to her location and seaworthiness. She was

found to have sounded proper fog signals. It was further adjudged that, notwithstanding her exposed location and character of employment, she was not a sea-going barge and hence not subject to the inspection laws of the United States. Accordingly, the owners of the Olympic were excused from failure to comply with the requirements of such statutes and of the inspectors. It was held that the Sakito Maru, even though she did not see the Olympic in time to avoid her, had, nevertheless, the last clear chance so that even if faults existed on the part of the Olympic, they would have been excused. The principal questions involved on this appeal as shown by the Assignments of Error (Ap. I, pp. 249-55) arise out of the foregoing determinations of the court below.

#### **E. Jurisdiction.**

The jurisdiction of this Court arises and exists under Article III, Sec. 2 of the Constitution and Sections 128 and 129 of the Judicial Code. (28 U.S.C.A. §§ 225-227) Jurisdiction in the District Court existed under the above constitutional provision and under Section 24 of the Judicial Code. (28 U.S.C.A., Sec. 41 (3) (Ap. I, p. 13 )

#### **F. Assigned Errors Relied Upon.**

Herein appellant relies upon Assignments of Error III to XXVII, inclusive. (Ap. I, pp. 249-55)

## ARGUMENT.

## I. THE QUESTION OF VISIBILITY.

The trial court found that the Olympic was clearly visible to a person standing at the bow of the Sakito for a distance of at least 1800 feet. This finding is made the basis of Assignment of Error XXIV. (Ap. I, p. 254)<sup>2</sup> The evidence on this question is so confused and conflicting that in our opening statement we contented ourselves with the assertion that the collision occurred in a fog. As the determination of this question is particularly crucial, we believe it appropriate to examine the record at once before turning our attention to the questions of fault.

If Jones be believed, visibility was two miles at the time of the collision. (Ap. II, pp. 498-500) If Ohiser, the night-watchman on the Olympic II, be believed—and he said he had the Sakito Maru under observation for 10 or 20 minutes before the collision (Ap. II, p. 687)—visibility must have been considerably greater, for the collision was at 7:10½ and between 6:50 and 7:03 the Sakito was going 16 knots. Similarly, if Grothe and Walter were able to observe the approaching Sakito Maru from their position on a small fishing vessel some 500 feet off the Olympic's stern, change her course definitely to port and again to starboard before the collision, she must have been seen a great distance away. So, notwithstanding these witnesses all heard fog bells and Grothe and Walter were sounding their own and heard fog whistles from the

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(2) "The District Court erred in finding that the Olympic II was clearly visible to a person standing at the bow of the Sakito Maru for at least 1800 feet." (Ap. I, p. 254)



Sakito Maru, there is, if this testimony as to visibility is believed, no case of fog collision here involved, and the precautions universally claimed to have been observed by all parties were a sort of idle exercise. (Grothe, Ap. I, pp. 425, 6; Walter, Ap. II, p. 651 )

As opposed to these witnesses, Harris, also a witness for libelant and aboard the Pat with Jones, could only see the Rainbow located perhaps as much as 500 yards easterly of him, because he knew where to look for her when he stopped his vessel a short time before the collision. (Ap. II, p. 527) Jones himself thought visibility was 300 yards when they came out in the Pat fifteen minutes before the collision. (Ap. II, pp. 499, 500) But Liddell, aboard the tug Clark lying some 75 feet off the Point Loma's port bow and probably little, if any, more than 200 yards from the Olympic II, first saw the Sakito when she was about 25 feet from the Olympic II. (Ap. II, p. 769) At the time, he was taking compass bearings on the Sakito's whistle and watching for her. (Ap. II, p. 769) This witness was the only disinterested one produced by either party who was not during the period in question engaged in some other distracting activity, and his judgment of visibility, gauged by the distance he saw the Sakito Maru from the Olympic II, confirms the testimony of her master and chief officer that visibility was about 200 meters. (Ap. II, pp. 867, 886; Ap. III, p. 1113 )

Other witnesses testified as to fog conditions. Smith, of the H-10 water taxi lying near the tug Clark off the Point Loma's port bow, testified at the trial that when his attention was called to her, the Sakito was about 600 yards or more from the Olympic. (Ap. II, p. 611) This

more than trebled his estimate given before the A Board a year earlier. (Ap. II, p. 637) Collins, aboard the Point Loma, thought he saw the Sakito across the deck of the Olympic about as far from the Olympic as the Point Loma was from her. The latter distance he estimated at 1000 to 1200 feet (Ap. III, p. 1065) The Coast Guard witness, Lieutenant Hewins, placed the Olympic about half as far from the Point Loma. (Ap. III, p. 987) But Collins confirms Liddell's statement that the latter called Smith's attention to the Sakito. (Ap. III, p. 1072) So Smith, the man who saw the Sakito 600 yards or more from the Olympic, had his attention called to the Sakito by Liddell, who was watching for her to approach on the compass bearings he was taking on her whistle and actually saw her only about 25 feet from the Olympic in the jaws of collision.

No estimates were given by the witnesses Karsh and Johnson, and those of Lieutenants Hewins and Bartlett are remote, as the C. G. C. *Hermes* did not arrive at the scene of the accident until about 8:10 a.m.; but the fact that even at that time visibility was a half mile to a mile, and the *Hermes* at first continued sounding fog signals while searching the wreckage, is not without all significance (Ap. III, p. 964; id. p. 1013) when regard is had to the trial court's finding that, at the time of the collision, the bright sun was breaking through and dissipating the fog. (Ap. I, p. 254, Ass. of Err. XXII)<sup>3</sup> Stiles, in

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(3) "The District Court erred in finding that at the time of the collision the fog, from the standpoint of those aboard the Sakito Maru, was not very thick and that the bright sun was breaking through and dissipating the fog." (Ap. I, p. 254)

charge of the water taxi Lillian L., which brought fishermen to the Olympic only a short time before the collision, stated that the fog was patchy and that visibility would vary from 300 to 800 yards. (Ap. II, p. 708 )

When the testimony of Lieutenant Bartlett (confirmed by Johnson, Ap. II, p. 571) is regarded that visibility from the deck of the *Hermes* was greater than from the bridge, and that the fog lay in layers (Ap. III, pp. 1031, 1032), and the fog's variable nature, as testified to by Stiles (Ap. II, p. 708), is given weight, it appears plain that the case is one of fog collision in which a particularly heavy patch surrounded the Olympic, and where it is not unlikely that persons near the water level might have seen the *Sakito* at a greater distance than persons on the *Sakito's* forecastle head and bridge elevated above the water could see ahead.

Both Captain Sato and Chief Officer Yokota of the *Sakito Maru* admitted that, prior to the time they sighted the Olympic about 200 meters ahead, they considered their range of visibility considerably greater. Sato put it at approximately 300 meters. (Ap. III, p. 1113) Yokota put it at about 500 to 600 meters. (Ap. II, pp. 867, 886)

Acting upon this testimony, the trial court concludes that the *Sakito's* lookout could have seen the Olympic at least 1800 feet away. The trial court appeared to be most strongly influenced by the testimony of libelant's witness Smith and respondent's witness Collins, as well as by the testimony of witnesses on vessels anchored several hundred feet astern of the Olympic, and of Johnson, a fisherman on the Olympic. Testimony of several per-

sons that they had no apprehension of collision when the Sakito was sighted was regarded as highly significant by the trial judge.

As noted, Smith testified in court that the Sakito was 600 yards or more from the Olympic when he first saw her, trebling his estimate of 150 yards to 200 yards given before the inspectors. (Ap. II, p. 611; id. p. 637) Collins and Liddell both testified that the latter called Smith's attention to the Sakito's approach just before the collision, yet Smith places the distance of the Sakito from the Olympic when he first saw her at least 1775 feet farther than Liddell, and 600 feet or more farther than Collins. (Liddell, Ap. II, pp. 768, 769; Collins, Ap. III, pp. 1065, 1072; Smith, Ap. II, p. 613) Collins also estimated that the Sakito pushed the Olympic so that, when she came to rest, she was only half as far from the Point Loma as before. (Ap. III, p. 1076) That would be a near broadside push of 500 to 600 feet. (Ap. III, p. 1065) If the Olympic was only about one-eighth mile from the Point Loma, as testified to by Lieutenant Hewins (Ap. III, p. 987), all of Collins' estimates would have to be cut in half, and if so reduced, would not be so unreasonably out of line with those of the Sakito as not to be accounted for by reasonable error. We do not see how Smith's statements on distance can be accepted at all.

As we pointed out above, the other witnesses saw so many things that morning that no vessel of the Sakito's size could have done within the period they saw her and which her gyro course recorder proves that she did not do, that we feel no credence can be placed in them.



Ohiser, for example, first saw the Sakito's starboard side on a parallel course 10 to 20 minutes before the collision. (Ap. II, pp. 664, 667) That would be a heading  $70^{\circ}$  or approaching a right angle off the course her recorder shows. The testimony of libelant's witness Stiles as to minimum visibility is not far from that at which the Sakito sighted the Olympic. (Ap. II, p. 708) It is without significance that witnesses who saw the Sakito approaching stem-on, estimated her distance in ship's lengths of which they could not then have had the slightest idea, or that lay witnesses, seeing her 62-foot beam beyond her bows and having no knowledge of the turning circle of vessels, felt no apprehension of danger. Apprehension of danger, or risk of collision is not something that a lay mind is necessarily equipped to appreciate. If it were, it would hardly have been thought necessary to put a preliminary to Article 18 in the International Rules, which reads as follows:

“Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.”

(33 U.S.C.A. Sec. 101.)

How could Grothe, Walter, Jones and Harris, anchored about 500 feet easterly off the Olympic's stern, even if they knew the rule, ascertain with any degree of certainty that no risk of collision existed? Johnson, aboard the Olympic, gave her only casual attention; he was fishing. (Ap. II, p. 556) He took no bearings.

Referring to the court's statement that witnesses of the Sakito, other than Sato and Yokota, could not or would not give estimates of visibility (Ap. I, p. 120), it suffices to say that those in the engine room could not see weather conditions, and Shimada was the only Sakito eye-witness who testified by deposition or orally, other than Sato and Yokota. Shimada was asked how far away he thought the Olympic was, and answered that he did not know. (Ap. II, p. 950; *id.* pp. 952, 953) He was not asked to give his best estimate. The statements which the Sakito Maru offered show that Kanda did not recall the distance (Ap. III, pp. 1288, 1290); that Aono was not in a position to see the Olympic prior to the collision (Ap. III, pp. 1290, 1291); that Namba saw the Olympic only just before the collision and was not on the bridge (Ap. III, pp. 1291, 1292), and Yokoyama made no statement that he ever saw the Olympic, but simply stated he could not estimate visibility during the short interval he stood lookout before he was relieved by Shimada. (Ap. III, pp. 1292, 1293) Possibly more light on these questions might have been developed had the trial court granted the motion for a continuance.

Of the witnesses examined, perhaps only Grothe and Jones can be accused of exhibiting definite hostility to the Japanese vessel. Grothe saw no lifeboat from the Sakito until "at the very least over an hour after the collision," and Jones increased his estimate of when the Sakito lifeboat arrived on the scene from 10 to 20 minutes between the time of the Inspectors' hearing and the trial. (Ap. I, p. 443; Ap. II, pp. 493, 494)

In these circumstances, we submit that the findings of the trial court that the Sakito should have seen the Olympic at least 1800 feet away is clearly erroneous and could only be reached by giving the greater weight to the inherently improbable testimony and the lesser weight to that which is consistent and credible. It should have been found that visibility from the Sakito was about 200 meters. (Ap. I, p. 254, Ass. of Err. XXIV)

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## II. THE QUESTION OF FOG SIGNALS.

### A. Factual Questions.

Nearly all of the witnesses testified to hearing one or more signals on the Sakito's fog whistle. But for that, their attention would not have been directed to her approach, and on this branch of the case, all roads lead to Rome. The Sakito's officers and crew above deck all heard the whistles sounded regularly at proper intervals after 7:03 a.m.

The problem of the Olympic's signals is both factually and legally more perplexing. The failure of the trial court to find that the Olympic failed to sound proper signals is the meat of Assignment of Error XII. (Ap. I, p. 252)<sup>4</sup> There is a mass of testimony from witnesses on neighboring small boats, and of one witness on the Point Loma, that they heard the barges, including the Olympic, ringing their bells regularly at proper intervals until just before the collision, when the Olympic rang contin-

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(4) "The District Court erred in not finding that the Olympic II failed to sound proper fog signals." (Ap. I, p. 252)

nously for a period, the length of which is uncertain. In viewing this testimony, it is of utmost importance to note that not one of the witnesses testified that the bell was actually rung at or near 7:03 and regularly at intervals a minute later, up to the time it was sounded continuously. In other words, this testimony is too general and too vague to be of much value; for, having heard the bells ring in rotation for about 15 seconds, a lull of 45 seconds, and another series of peals over a period of some minutes, the fact of having heard the bells so sounded would carry over in the witnesses' consciousness a period of quiescence. Libelant's witness Walter put this psychological fact in words of great simplicity when he said: "You hear these things, and being out there so many times, you kind of expect them." This comes pretty close to stating that the testimony of these witnesses is rather to be regarded as negative than positive testimony. In effect, they state they heard the bells of the barges rung in rotation and were not, at any time, conscious of any interruptions in their peals.

The lack of weight of such general testimony is emphasized by the fact that Ohiser, the man who rang the bell, though he had been on duty since 4 p.m. on the day before, stated that there were a couple of intervals between 6:30 and the collision when the bells of the barges stopped ringing "for just about a few minutes." He could not fix the time because he did not look at his watch. Whether this was during the critical period after 7 a.m., he could not say. (Ap. II, pp. 683-5) While this very bell was used to announce time aboard ship (Ap. I, p. 353), the witness



had no notion as to whether he might have stopped ringing it "for just about a few minutes" after 7:05, when the approach of the Sakito made it particularly vital to give the signal. As Ohiser was the man best able to know the truth about this matter, and as he cannot testify positively that the bell was rung at regular intervals during the period before the collision and directly contradicts witnesses who state that the bells of all the barges rang at regular intervals continuously after 6:30 or 6:45, or some other time, we respectfully submit:

1. Under the actor rule, the testimony of Ohiser that he stopped ringing for two intervals of a few minutes after 6:30 and before 7:10 should be accepted.
2. That the negative testimony of the deck officers and men on the Sakito Maru that the bell was not heard before they saw the Olympic II should be accepted as proof that such bell was not rung for the few minutes before 7:09 when it might have been within the range of their hearing.

The trial court's statement (Ap. I, p. 127) that "the only conflict raised" in regard to the Olympic's fog signals comes from the Sakito Maru "that no signals were heard" ignores the testimony of Ohiser himself, the man who gave the signals—if they were given. It credits general testimony of witnesses whose attention could not be, or was not, directed to a single instant of time, and states such testimony is "overwhelming." It is overwhelming in numbers of witnesses only; its weight is negligible when regard is had to the facts of this case

and the situation of other vessels ringing bells in that area. Particularly is this true when the man charged with the duty cannot say positively that it was performed at the critical period, and those on the colliding vessel did not hear the bells.

#### B. Legal Questions.

As the Olympic II, Point Loma and Rainbow lay as purprestures across the courses of vessels southbound from and northbound to Los Angeles, they occupied fixed positions. (Ap. III, p. 974) They were not lying at anchor, and were not on the headings upon which an experienced navigator would expect to find them under the conditions of wind then prevailing. They were heading west instead of northerly, as did the anchored Pat and Marell, which were riding to anchors.

The Olympic and the other barges were, we believe, technically moored or tied up in fixed positions. Counsel for a libellant referred to them as "parked" (Ap. III, p. 1024), and while non-technical, it is very descriptive of the situation. They had converted a portion of the sea lane to Los Angeles harbor into a private anchorage ground. The degree of obstruction they presented would be measurable by their overall lengths and by the pitch of their stern and bow anchor chains when brought into relation with the 100-foot depth of the water and the draft of an approaching vessel. The Olympic had over 600 feet of chain out forward and at least 300 feet (possibly 200 yards, Ap. III, p. 1017) out aft. It has frequently been held under the provision of the Inland Rules, corresponding to Article 15 (d) of the International

Rules and bearing the same number, that a moored vessel is a *casus omissus* in the rules and should take steps necessary in fog to make her presence known to navigating vessels. Thus, in

*Pennsylvania R. Co. v. Central R. R. of N. J.*, (1939)  
(C.C.A.2) 103 F.(2d) 428, 429; cert. denied 308  
U.S. 591,

“We have repeatedly held that when two or more fog-bound vessels are moored abreast outside a pier-end, they must sound some warning. This neither the statute, nor the rules require: It is judge-made law, and possibly it is ill-made law. But at least there is this to be said for it; that the position of those of the vessels which are moored outside that which is next the pier-end, is for all practical purposes the same as though they were anchored in the channel. Certainly when six, seven, or even ten, as is sometimes the case, are so moored, the analogy is very close indeed. It is of course true that such vessels are not anchored, and for that reason Art. 15(a) (d), Inland Rules, 33 U.S.C.A. § 191 (a) (d) does not apply to them; but there is surely a good reason to require some warning from them; and we are not disposed to abate the requirement in such situations.”

See:

*The Youngstown* (1930), 40 F. (2d) 420 (C.C.A.2):

“The reason of the rule is that, in such a position, vessels to be excused at all, *must make themselves known*, either by sight or sound.”\*

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\*Emphasis throughout this brief supplied.

A strong decision in point is that of Circuit Justice Lacombe in

*The Kennebec* (1901), 108 F. 300 (C.C.A.2).

As she lay tied up on September 4, 1940, we believe that the Olympic was no less a floating plant than the dredge involved in

*Petition of Red Star Towing etc. Co.* (1929) 30 F. (2d) 454 (C.C.A.2); affg. 30 F. (2d) 452; cert. denied 279 U.S. 844,

and the drill boat in

*The Marian* (1935), 66 F. (2d) 354 (C.C.A.9); cert. den. 290 U.S. 687.

She was not technically an anchored vessel. While some of the foregoing authorities and others to the same general effect indicate that such a vessel may sound the bell of a vessel at anchor by analogy, the real legal test is not whether she sounded a bell, but whether she gave notice by sound appropriate to her position in accordance with the practice of good seamanship.

Where contention was made that a vessel at anchor in fog should have moored with bow and stern anchor, it was rejected by District Judge Rose in

*The City of Richmond* (1920) (D.C.Md.), 265 F. 722, 725,

the court saying:

“The Texan argues that it is so rare for merchant vessels to make themselves fast in the manner suggested that an unexpected resort to it in thick



weather would increase rather than diminish danger to other craft. When a ship's lights are made out, the natural presumption, in view of the almost universal practice, is that the ship is heading to wind and tide. If, in a particular instance, this assumption turns out to be wrong, a collision may well result."

We submit that, even if this court should determine that the Olympic II did sound her bell at the critical period, in her situation such warning was not adequate to her unusual position, involving as it did an obstruction of unusual length lying upon an axis almost exactly perpendicular to what an approaching steam vessel would expect. When it is further considered that there was no evidence to show that the Olympic II was prepared to take any other step to protect herself and other vessels, such as casting off one anchor and paying out or moving up on her chain to the other, the case is all the more flagrant. See

*The Baltimore* (1922), 283 F. 728 (C.C.A.1);

*The West Cherow* (1921), 276 F. 585 (E.D. Va.)

The above discussion has not considered the possible application of Article IX(i), 33 U.S.C.A. Section 79 (i) to the Olympic. That section provides, so far as material here:

"In fog, mist, falling snow or heavy rainstorms  
\* \* \* vessels line fishing with their lines out, shall, if of twenty tons gross tonnage or upward, respectively, at intervals of not more than one minute make a blast; if steam vessels, with the whistle or siren,

and if sailing vessels, with the fog horn, each blast to be followed by ringing the bell.”

Subdivision (h) of the same Article of the International Rules requires such a vessel, when it becomes stationary in consequence of its gear getting fast to a rock or other obstruction, to comply with Article 15(d); i. e., sound her fog bell. The Olympic appears not to be within subdivision (h), for at the time of this collision she was tied up with her lines out (Ap. II, pp. 556-8), and if within subdivision (i) *supra*, should have both sounded her whistle and rung her bell. The other situations in which fishing vessels are required to take this precaution provided for in subdivision (i) would indicate that its purpose is to require whistle and bell when a fishing vessel presents in a fog an obstruction greater than that which her hull alone would present. It applies also to “drift-net vessels attached to their nets, and vessels when trawling, dredging, or fishing with any kind of drag net”. Here the record shows that Johnson had some 200 yards of line out increasing by so much the obstacle which the Olympic presented to an approaching vessel. (Ap. II, pp. 556-8) Exaction of a signal more apt to cause notice and to convey more precise information where the nature of the obstruction is unusual would, therefore, seem the purpose of the rule, and, so construed, the Olympic is within it and guilty of clear statutory fault.

So far as we can determine, the above section of the Rules of the Road has not received judicial construction, but Marsden remarks:

“The fog signals required to be made by fishing vessels are prescribed by Article 9 (i).” (9th Ed. (1934) p. 338)

In any view, we consider that the Olympic II, 3.3 miles off the breakwater and harbor entrance, did not use care appropriate to her position directly athwart the “steamer lanes” into and out of Los Angeles harbor. See

*The Silverpalm* (1937), 94 F.(2d) 754 (C.C.A.9).

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III. THE OLYMPIC II WAS DELIBERATELY TIED UP AND MAINTAINED IN A KNOWN STEAMER LANE IN VIOLATION OF STATUTE AND CONTRARY TO GOOD SEAMANSHIP.

There can be little question concerning the actual position of the Olympic at the time of the collision. Lieutenant Hewins, commander of the U. S. Coast Guard Cutter *Hermes*, took sextant observations on six points while on a barge which was moored over the wreck. According to these observations, the wreck was 3.3 nautical miles in a direction  $159\frac{1}{2}$  degrees true from the lighthouse at the end of the San Pedro breakwater. The observations of Lieutenant Hewins were adopted by the United States Army Engineers in fixing the location of the wreck, and this position is the one shown for the wreck on the latest issues of Charts Nos. 5101 and 5143 of the U. S. Coast and Geodetic Survey. (Ap. III, pp. 970, 971; Sakito's Exhibits P and Q)

The only difference between the position of the wreck as fixed by Hewins and the position of the Olympic at

the time of the collision is the distance the Olympic moved from her fixed position as a result of the impact. Hewins testified that the wreck was within 150 to 200 feet from the prior position of the Olympic. (Ap. III, pp. 1014, 15) This coincides with the estimates of various witnesses as to the distance that the Olympic traveled following the collision and until she sank. (Ap. I, p. 467; Ap. II, p. 616) (300 ft. Ap. II, p. 722)

There were no recent bearings taken on the positions of the three barges and the record indicates that they were continually having trouble with their anchors. (Ap. III, p. 1070; id. pp. 1369-75) Hewins placed the Point Loma  $\frac{1}{8}$  mile from the Olympic in a northerly direction, and the Rainbow or Samar  $\frac{1}{3}$  mile from the Olympic in an easterly direction. (Ap. III, p. 987) There is a good deal of conflict on the point, but in any view the barges with their anchor chains presented at the very least an obstruction to navigation extending a half mile directly across the steamer lanes 3 to 3.3 miles off the harbor entrance.<sup>5</sup> There is not the slightest question but that vessels bound north and south frequently passed close aboard the barges easterly and westerly of them. This statement could be supported by references to the Apostles too legion to undertake.

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(5) Assignment of Error VI: "The District Court erred in not finding that the Olympic II was at fault for anchoring and remaining in the position and location in which she was at the time of the collision under the conditions then existing."

Id. VII: "The District Court erred in not finding that the Olympic II, at the time of and prior to the collision, was anchored and maintained in a dangerous position so as to constitute a menace to navigation and that such fault was a cause of the collision." (Ap. I, p. 251)



The courses  $340^{\circ}$  true northbound and  $160 - 162^{\circ}$  true southbound steered by vessels to and from Los Angeles harbor (Ap. III, p. 974; id. p. 1303) are, of course, simply headings, and whether a vessel will be brought up on such heading at a point  $159\frac{1}{2}^{\circ}$  true off the lighthouse will depend to some extent on her point of departure and upon vicissitudes of tide, wind, necessity to navigate for other vessels, and other circumstances. (Ap. III, p. 992) Suffice it to say that vessels' courses might intersect or come very close to the position of any of the barges, and on September 4, 1940, the course of  $340^{\circ}$  true steered by the Sakito Maru carried her directly into the side of the Olympic II.

Captain Arthur and Lieutenant Hewins explained these matters in some detail in their testimony. (Ap. III, pp. 1025-7; id. pp. 1297-1303) Captain Arthur also pointed out that the projection of a course of  $340^{\circ}$  true, leading directly to the center of the entrance way to Los Angeles harbor, would be distant only 400 yards from the position of the wreck of the Olympic. (Ap. III, pp. 1304, 5)

Despite the position of the Olympic, the Hermosa Amusement Corporation, Ltd., never requested any notice to be issued to mariners by the Hydrographic Office concerning the location of the Olympic. (Ap. I, p. 412) Lieutenant Hewins testified that he never saw any written information issued to mariners concerning the location of the Olympic and the other barges, and no such information was contained in the Coast Pilot. (Ap. III, p. 1001)

To be added to the foregoing facts is the further important one that the Olympic was actually warned in

May or June of 1940 by the United States Coast Guard Service that the barge was anchored in a very dangerous place. Similar warnings were given at the same time to the Point Loma and to the Rainbow by Ensign Shoemaker and Mr. Moynahan. (Ap. III, pp. 1050, 1052)

It seems to us that the facts previously discussed would establish to the satisfaction of everyone that the positions of these barges, including the Olympic, were a serious menace to navigation and an ever present danger, not only to the safety of the persons and property aboard such barges, but to all vessels required to enter and leave Los Angeles harbor in the directions mentioned. Three practical navigators, Captain Arthur, Captain Sato and Mr. Moynahan, were asked their opinions on this question, and their testimony is undisputed that the position of the Olympic was a danger to the safety of herself, persons and property on board, and to all vessels approaching and leaving Los Angeles harbor on the courses previously mentioned. Mr. Moynahan, a warrant officer of the United States Coast Guard Service of 20 years' experience at sea and with 16 years' service with the Coast Guard, testified that the position of the Olympic was dangerously close to the established steamer lanes. (Ap. III, pp. 1047, 50, 53) Captain Arthur testified that in his opinion it was not good seamanship to anchor the Olympic in such a position; that anchored in such a position she was in a dangerous place with respect to the safety of herself, the persons and property aboard, and other vessels approaching and leaving Los Angeles harbor, and that she was a menace to navigation with respect to such other

vessels. (Ap. III, pp. 1309, 1327) The matter is simply but eloquently described by the spontaneous answer given by Captain Sato to a question asked by counsel for the Olympic on cross-examination. He was asked by counsel whether he had ever consulted with his First Officer as to whether or not there were any fishing spots in the vicinity of Los Angeles harbor:

“A. I never did consult with him. I never thought that in a harbor as busy as Los Angeles, where ships were going in back and forth, that there would be any fishing barge close to the harbor.” (Ap. III, p. 1217)

Suppose such a barge were tied up 100 yards directly outside or to seaward of the entrance way to the harbor and were maintained in that position for a period of four months. We submit that it would require little to establish to the satisfaction of even the uninitiated that such was an improper and a dangerous place to lie. Move the position of the barge and her chains one mile to seaward from the entrance way in the path of incoming and outgoing vessels. Again little should be required to demonstrate the danger of the position. Move the barge to the position in which she was, 3.3 miles from the entrance way, and place her and her chains broadside to traffic: The danger of her position to incoming and outgoing vessels is lessened only a matter of a few degrees as compared with the positions previously mentioned. Add the factor that the barge is in line with two other barges strung across this path of traffic for several hundred yards and throw in a dense fog which

conceals her and the other two barges from all approaching vessels, and you have as good a recipe as is contained in any admiralty decision for a first-class collision. We submit that, apart from statute, the place in which the Olympic was maintained was an act of negligence on the part of her owners, and that she was a maritime nuisance. (Ass. of Err. VI, Ap. I, p. 251)

Section 409 of Title 33, U. S. Code, makes it unlawful "to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft," and this statute has received judicial construction which, we submit, renders it applicable here.<sup>6</sup> Thus, the court states in

*Eastern Transp. Co. v. United States* (1928) 29 F. (2d) 588, 590-591 (E.D.Va.) aff'd 40 F.(2d) 27 (C.C.A.4):

"As generally understood, a channel is a depression, either natural or artificial, below the permanent banks over which the waters flow. \* \* \* As used in paragraph 15 of the statute (33 U.S.C. 409), it must be considered in connection with the language in paragraph 19, which extends its terms to any 'river, lake, harbor, sound, bay, canal, or other navigable

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(6) Assignment of Errors VIII; "The District Court erred in finding that at the time of the collision the Olympic II was not anchored in the vicinity of any channel or fairway and in not finding that at such time she was anchored in a navigable channel within the meaning of Section 409 of Title 33 of the United States Code."

Id. IX: "The District Court erred in finding that the Secretary of War had sufficient authority to prohibit the anchorage of the Olympic II at her place of anchorage and that there was a presumption that her place of anchorage was safe and proper because the Secretary of War had not prohibited the same." (Ap. I, pp. 251-2)



waters of the United States' (33 U.S.C. 414), and, if this be true, the act would apply to the open waters of Block Island Sound, and this, I think, is the correct construction to be placed upon its language. I am not advised of any case in which the precise question has arisen, but I think the conclusion consonant with the purpose Congress had in view in enacting the statute. Judge Hughes, in this court, in the case of *The Oliver*, 22 Fed. 849, defined the term 'channel' as referring sometimes to the current of a running stream, but said: 'In tidewaters the term refers to the movement of vessels, and means that part of the water on which vessels move.' That the point at which the Snug Harbor sank was in this sense a frequented channelway is abundantly shown in the evidence, for it is uncontradicted that the great majority of north and southbound coastwise vessels going to and returning from Rhode Island and Massachusetts ports steer a course to take them over or close to the point of the wreck."

*The Lehigh* (1935), 12 Fed. Supp. 75, 81 (W.D.N.Y.):

"The collision happened in the course regularly followed by upbound vessels navigating between Buffalo and Lake Erie ports and Detroit, Mich., and, thus, within a navigable channel within the meaning of Sections 15 and 19 of chapter 425 of the Act of March 3, 1899 (33 U.S.C.A. 409, 414)."

The extenuating circumstances of anchoring in the lanes of commerce or loitering therein in fog while in the course of a voyage have been held insufficient excuse.

*The Persian* (1909), 181 F. 439 (C.C.A.2);

*The Admiral Schley* (1904), 131 F. 433, 436 (C.C.A. 1).

In the first cited case, the collision occurred in the open sea five miles off the Massachusetts coast. Here the Olympic II has not the excuse of a lost and fog-bound vessel, uncertain of her course and anchoring for safety. She had usurped a portion of the navigable waters 3.3 miles from a narrow harbor entrance and held a fixed position there for nearly four months prior to the collision. The general area between Santa Catalina Island and the mainland where this collision occurred is known as San Pedro Channel. (Ap. III, p. 1164) We submit that the Olympic II was tied up in a channel and that her fault in that regard was gross and a violation of statute as well as negligence. (Ass. of Err. VIII, Ap. I, p. 251)

The trial court appears to lay stress upon the point that the Secretary of War has not acted pursuant to the apparent authority conferred by Section 1 of Title 33, U.S.C.A., to prevent the Olympic from occupying the place she did, and states:

“It is reasonable to assume that if the Secretary of War considered the place of anchorage of the Olympic dangerous to navigation, he would have acted.” (Ap. I, pp. 129, 130)

We submit that assuming the power existed in the Secretary of War to take action, his inaction has no bearing upon the question whether the Olympic was anchored or tied up negligently or in violation of Section 409 of the same title. Even if it had been shown that the Secretary of War had notice of the presence of such barges, and it was not, his judgment thereon would be merely executive opinion.

IV. SINCE THE OLYMPIC II WAS NEGLIGENTLY OR UNLAWFULLY TIED UP, SHE WAS AT FAULT. SINCE SHE DID NOT, UNDER THE CONDITIONS OF FOG PREVAILING AT THE TIME, GIVE NOTICE OF HER PRESENCE BY SOUND TO THE APPROACHING SAKITO MARU, SHE WAS SOLELY RESPONSIBLE FOR THE COLLISION.

We have endeavored to demonstrate in subdivision III hereof that the Olympic was unlawfully and imprudently tied up. We believe the record references made in subdivision I establish that the Sakito was competently officered and could not have discovered the Olympic any sooner than she did.<sup>7</sup> Captain Sato placed this distance at about 200 meters from the Sakito's stem. (Ap. III, p. 1233) Chief Officer Yokota placed it as 200 meters from the bridge. (Ap. II, p. 893) Both testified that prior to the collision they thought their visibility was considerably greater. (Sato, Ap. III, pp. 1113, 1276, 300 meters) (Yokota, Ap. II, pp. 867, 886, 7, about 500-600 meters) At her speed of slow ahead, which did not exceed  $6\frac{1}{2}$  knots, the Sakito could have been brought to a stop within the limits at which her officers estimated they could see. (Ap. III, p. 1140) She would not answer her helm properly at a speed of less than 5 knots. (Ap. III, p. 1243)

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(7) Assignment of Errors IV: "The District Court erred in not finding that the Olympic II was at fault for said collision."

Id. V: "The District Court erred in not rendering judgment in favor of Nippon Yusen Kabushiki Kaisya and against Hermosa Amusement Corporation, Ltd., on the libel and cross-libel in the above-entitled cause and on the petition under the 56th Admiralty Rule in the above entitled and consolidated causes." (Ap. I, pp. 250-251)

We consider the Sakito Maru was not in fault (a) because Articles 15 and 16 of the International Rules dealing with speed in fog and sound signals are *pari materia* and should be construed together, and (b) the mistake of the officers of the Sakito as to the extent of visibility was, under the variable conditions of fog which they had had under observation only six minutes before the Olympic was sighted, excusable.

The decision in

*La Bourgogne* (1898), 86 F. 475 (C.C.A.2) cert. denied 172 U.S. 646,

where the anchored Ailsa was mortally wounded and sank after being cut into some 16 feet by the larger and moving *La Bourgogne* seeking anchorage in a fog with visibility of one to two ship lengths, is closely in point even as to the size of the vessels. There the Ailsa's place of anchorage was faulty and her fog bells were not heard by the *La Bourgogne* moving two to four knots through the water and four to six knots over the ground seeking anchorage. The libels of the Ailsa's owners and underwriters, and of an injured passenger, were dismissed by the district court and its action affirmed on appeal. Immediately on sighting the Ailsa, the *La Bourgogne* had ported her wheel and reversed, but these steps had been insufficient to change her heading or to check her speed sufficiently to avoid the Ailsa.

Relative to speed, the size of the wound made in the Ailsa, and the latter's failure to pay out chain, the remarks of Judge Addison Brown in the District Court are partic-



ularly instructive here. His opinion is reported in 76 Fed. 868, and he said:

“She was going to the anchorage ground of Gravesend Bay, the most spacious, the most convenient, and the most usual anchorage ground for vessels outward bound; and if she was not in fault for seeking that anchorage her speed of 2 to 4 knots through the water, kept up by occasional turns of the engine with frequent stops, was not only moderate, but evidently as slow as was compatible with any proper handling of so large a ship. The collision was nearly head and head. Yet the impact of collision was not violent, but comparatively gentle. There was no shock; no breaking of anchor, chain, or windlass; though the Ailsa, held fast by her anchor, received the Bourgoigne’s stem with the whole weight of 5,000 tons of ship and cargo, behind it. Nevertheless the wound extended but 6 feet inboard, and 16 feet on the line of the Ailsa’s keel; and the Bourgoigne, all the time backing her engines went immediately clear without any entanglement. From these circumstances, in connection with the direct evidence, I have no doubt that a speed of 2 knots by the Bourgoigne was abundantly sufficient to cause such a wound as the Ailsa exhibits; that the way of the Bourgoigne through the water was therefore substantially stopped at collision, as her officers testify; and that her impact was scarcely more than by the drift of the tideway; so that if chain had been given, the collision would have been avoided.

“There can be no question that a good lookout was kept up on the Bourgoigne; that the Ailsa was seen and reported as soon as she could be seen; that the Bourgoigne at once reversed, and as I judge stopped her way through the water before collision, from



a previous speed of not more than 3 or 4 knots. This she would do on reversal in going from about 350 to 500 feet, including the tide (*The Normandie*, 43 Fed. 161); and this, according to the evidence, is about the distance she was away when the Ailsa was discovered. The Bourgoigne's account is credible and probable, and I do not find any fault proved in these respects."

The above decision is followed and approved in

*The Benjamin A. Van Brunt* (1899), 98 Fed. 131 (C.C.A.1).

Likewise, in

*The Kennebec* (1901), 108 Fed. 300 (C.C.A.2),

in a forceful opinion by Circuit Justice Lacombe, the libel of a barge owner for collision damage sustained by a stationary barge when run into by the Kennebec in motion was dismissed. Gauged by the distance at which the steamer saw the barge, visibility was about 50 feet. The steamer could have been stopped in about 125 feet. The court also points out that even if the steamer had seen the barge moored as she was in clear weather, her master had a right to assume she would not be left there in fog. It was held that the barge should have sounded signals to advise the steamer of her position when conditions were such that she could not be made out by sight.

Referring to the so-called "rule of sight," Judge Knox states in

*The Kungsholm*, 1938 A.M.C. 1334, 1342 (S.D.N.Y.):

"The rule is not to be applied where the presence of the other vessel was not made known as required

by law to the moving vessel. *La Bourgogne*, 86 Fed. 475, cert. denied, 172 U.S. 646; *Kennebec*, 108 Fed. 300; *Erie Transportation Company v. City of Chicago*, 178 Fed. 42, cert. denied 216 U.S. 620."

And in

*The Georgia* (1913), 208 F. 635, 645 (D.C.R.I.),  
the court likewise points out that:

"Safety in a fog is not sufficiently provided for by relying solely upon the reduction of speed of the moving vessel."

We submit that in this case, if the signals of the *Olympic* had been properly sounded, they would have been heard by the *Sakito Maru* forward of her beam within time for her to have stopped and sufficiently taken off her way to have avoided this collision. We submit further that, in navigating his vessel, Captain Sato had a right to assume that he would not encounter vessels violating the rule of sounding signals in fog. If the rule of sight is to be applied in a case of this nature, the reasoning of the foregoing authorities must be rejected here and the rule be laid down as a universal one that any vessel maintaining proper lookout, but colliding in a fog with any object, is, as matter of law, in fault and must confess fault in any litigation because in all such cases she cannot stop within the limits of her visibility. We do not think the better reasoned cases lay down any such inflexible principle or fix unquestioned fault as the price of movement in fog regardless of the conduct or situation of the vessel or structure collided with. (Ass. of Err. IV and V, Ap. I, pp. 250, 51)

This leads us to the next question, which is whether Captain Sato and his chief officer were in fault for their inaccurate estimate of visibility.<sup>8</sup> This is material because the testimony is that their vessel could have been stopped within the distance they thought they could see. We have already noted that the fog was patchy and variable and that visibility at water level would exceed that on the elevated forecastle head and bridge of the *Sakito Maru*. The navigating officers had only six minutes after encountering these conditions within which to appraise the situation. For the first three minutes of this time, the speed of their vessel was decelerating. (Ap. II, pp. 826, 7; Ap. III, p. 1107) The question is not whether a mistake was made; the mistake is admitted. The question is whether a careful and prudent navigator might have made it.

*The Old Reliable* (1921), 269 F. 725, 728 (C.C.A.3):

“No man is infallible, and there are certain errors of judgment for which the law does not hold a person liable; but he is liable for an error of judgment which a careful and prudent navigator would not have made. *The W. E. Gladwish*, 17 Blatchf. 77, 83. Fed Cas. No. 17,355.”

*The A. P. Skidmore* (1902), 115 F. 791 (C.C.A.2):

“In this case, the question is whether at the time and under the circumstances reasonable prudence was observed. In a case like the present, the court should

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(8) Assignment of Errors XVIII: “The District Court erred in finding that the Japanese Motor Vessel *Sakito Maru* was proceeding at an immoderate speed at the time of and prior to the collision.” (Ap. I, p. 253)

put itself in the position of the master at the time, and, unless it is satisfied that he did not exercise the discretion consistent with sound judgment, should refuse to condemn his mistake as a fault.”

The matter of moderate speed is left to the discretion of the navigator, and we submit that, if he is alert and on the bridge, hindsight should not be indulged in to inculcate his vessel. As to the first point, in

*Lie v. San Francisco & P. S. Co.*, 243 U.S. 291,  
37 S. Ct. 270, 61 L. ed. 726, 732,

referring to Article 16 of the International Rules, the court says:

“The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator discretion as to what shall be ‘moderate speed’ in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him.”

We conclude that the evidence discloses no negligence of the navigators of the *Sakito Maru* and that, in the absence of fault, she should not have been held liable for any loss incident to this collision. Under the circumstances disclosed, the finding of immoderate speed was unjustified. (Ass. of Err. XVIII, Ap. I, p. 253)

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#### V. THE OLYMPIC'S LOOKOUT WAS NOT SUFFICIENT.

While in the situation in which the *Olympic II* was maintained on September 4, 1940, there was nothing



beyond giving proper signals and more vigorously employing them when danger approached that a proper lookout might have done, nevertheless the lookout on the *Olympic* was so defective that, in any view of the law and the circumstances, we think that this additional fault is properly attributable to her. (Ass. of Err. X, Ap. I, p. 252)<sup>9</sup>

We have already noted that the duties of Ohiser had commenced at 4 p.m. on the preceding day. (Ap. II, p. 676) He usually slept during the daytime, but, on the morning in question, stood by to help out Greenwood, the shipkeeper, and Culp, the bait boy. Little more than a recapitulation of this man's testimony is sufficient to demonstrate his lack of competence. During all of the material times involved, he alone was entrusted with the protection of the lives and property on board the barge as she lay tied up, directly in the steamer lanes, during the foggy weather which prevailed. In fact, he was not really on duty. His duties were over at 6 o'clock, but he testified that he told the boys on the day crew that he "would stay and give them a little hand." (Ap. II, pp. 703-5) While he was supposedly standing lookout and attending to the ringing of the bell, he went in the restaurant around 6:30 and ate breakfast. (Ap. II, p. 661) We submit that one can search the reported decisions of our admiralty courts in vain to find a more complete and non-chalant disregard of the duties of a lookout.

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(9) "The District Court erred in not finding that the lookout on the *Olympic II* was grossly inattentive and incompetent, failed to sound proper fog signals and neglected to take other precautionary steps required in the practice of good seamanship and by the attendant circumstances, and that these faults contributed to the collision."



He testified that he saw the Sakito 10 to 20 minutes before the impact. (Ap. II, p. 687) At that time he said that the Sakito was about 5 or 6 ship-lengths distant from the Olympic. (Ap. II, pp. 689, 690) Before he sighted the Sakito, he testified that he heard some kind of a noise that he thought might have been the propellers. (Ap. II, pp. 692, 693) This man's testimony is so replete with contradictions and inconsistencies as to distances and sounds that it should be rejected on those subjects. He is consistent only in the statement that he stopped ringing the bell on two occasions.

When he first saw the Sakito, it seemed to him that she was heading in the same direction as the barge on an absolutely parallel course. (Ap. II, pp. 664, 665) We respectfully request the court to examine the diagram drawn by Ohiser, which is Olympic's Exhibit No. 7. (Ap. II, p. 666) We also respectfully request the court to refer to the diagram drawn by Ohiser at the time his testimony was given before the "A" Board on September 6, 1940. This was introduced in evidence as Sakito's Exhibit D. (Ap. II, p. 696)

The requirement of a lookout having undivided duties is universally recognized:

*The Ariadne* (1872), 80 U.S. 475, 478, 20 L. Ed. 542;  
*The Knoxville City* (1940), 112 F. (2d) 223, 226  
 (C.C.A. 9);  
*The Koyei Maru* (1938), 96 F. (2d) 652, 654  
 (C.C.A. 9).

Ohiser's duties were not undivided, and a more detailed analysis of his testimony concerning his ringing the bell

aboard the Olympic is as follows: Between 6:30 and 7 o'clock it was foggy off and on, and he could see, off and on, the side of the Rainbow. (Ap. II, p. 689) He only rang the Olympic's bell when he heard the bells of the other barges preceding it. He did not on his own initiative ring the Olympic's bell when the other barges were not ringing their bells. (Ap. II, p. 680) There were times when the Rainbow sounded its bell, but he did not sound the Olympic's bell, and at those times the fog was "kind of light" toward the shoreline or the breakwater. (Ap. II, pp. 680, 681) The fog was intermittent and varied between 6:30 and 7:10 a.m. (Ap. II, pp. 679, 680, 683) Sometimes it would lighten up. On a couple of occasions when the fog lightened up, the barges discontinued ringing their bells. He did not look at his watch to determine whether these occasions were near 7 o'clock or how long the barges discontinued ringing the bells. (Ap. II, pp. 683, 684) He didn't look at his watch to determine whether it was 7 or 7:05 or 6:55 or 7:07. (Ap. II, pp. 683-5) Again, answering questions propounded by the court, he testified:

"Q. You say that this Sakito was in your vision from 10 to 20 minutes?

A. Something like that.

Q. But what I am trying to ascertain is whether any time there, whether it was 10 minutes or 20 minutes, did you at any time during that period let up ringing your bell at intervals?

A. I wasn't sure exactly. I think I did. My mind was practically set on that ship, whether she was going to turn right or going beyond us." (Ap. II, p. 688)

While the fundamental fault lay with the general unpreparedness of the Olympic to remove herself or to take steps in avoidance of anticipable dangers in fog, we believe that if the Olympic had had a proper lookout and a proper signal man at her bell it is probable that her presence would have been made known to the Sakito Maru in time to stop her engines and ascertain the Olympic's position. In this connection, it is not without significance that Ohiser testified that Greenwood came up just before the collision and told him to ring the bell hard, and actually took hold of the bell rope at the same time and helped Ohiser. (Ap. II, p. 704) If Ohiser had been doing a proper job before, it seems unlikely that Greenwood would have felt himself obliged to give instruction and physical assistance in ringing a fourteen-inch bell.

In his discussion of Article 29 of the International Rules, which is known as the Rule of Precaution, La Boyteaux, in his work

*The Rules of the Road at Sea,*

says at page 230:

“Sudden emergencies may at times require a vessel to anchor where she ought not to anchor under normal conditions. In such cases, the vessel being anchored perhaps in a fair-way or other improper berth, extraordinary precautions adequate to such position should be taken for the benefit of approaching vessels. Moreover, the vessel should be removed as soon as conditions permit.”

We submit that the Olympic's lookout was inefficient under any accepted authority, and woefully inefficient contemplating her self-established helpless condition.

**VI. THE OLYMPIC WAS UNSEAWORTHY AS TO MANNING AND CONSTRUCTION, AND SUCH CONDITIONS CONTRIBUTED TO THE COLLISION OR TO THE LOSSES.**

**A. The Olympic Was Incompetently and Inadequately Manned.**

The Olympic was a seagoing barge and was incompetently and inadequately manned because it failed to comply with statutory requirements of certificated personnel. Captain Anderson made no effort to learn if any of the three crew members on board at the time of the collision were certificated (Ap. I, p. 386) No showing is made that Greenwood or Culp had any certificate, and Ohiser was an ordinary seaman, a rating less than able seaman. (Ass. of Err. XIII, Ap. I, p. 252)<sup>10</sup>

The statutory requirements are:

“No vessel of 100 tons gross and upward, except those navigating rivers exclusively and the smaller inland lakes and except as provided in Section 569 of this Title, shall be permitted to depart from any port of the United States unless she has on board a crew not less than 75 percentum of which, in each department thereof, are able to understand any order given by the officers of such vessel, nor unless 65 percentum of her deck crew, exclusive of licensed officers and apprentices, are of a rating not less than able seamen. \* \* \*”

(46 U.S.C. § 672, subd. (a))

“The provisions of Section 672 of this Title, (as amended) requiring the manning of certain merchant vessels by persons holding certificates of service or

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(10) “The District Court erred in not finding that the Olympic II was incompetently and inadequately manned and that this fault contributed to the resultant loss of life, personal injuries and property damages.”



efficiency issued by the Bureau of Marine Inspection and Navigation, shall not apply as to unrigged vessels, *except seagoing barges \* \* \*.*"

(46 U.S.C. § 672b)

"When used in Section 643a, 660b and 672b—

"(1) The term 'unrigged vessel' means any vessel that is not self-propelled.

"(2) The term 'seagoing barge' means any barge which from its design and construction may be reasonably expected to encounter and ride out the ordinary perils of the seas and which, in fact, in the usual course of its operations passes outside the line dividing inland waters from the high seas, as defined in Section 151 of Title 33, as amended."

(46 U.S.C. § 672c)

The exception of Section 569 referred to in section 672, subd. (a), *supra*, is not pertinent here. The Olympic was a vessel of more than 100 gross tons. She was not used in navigating rivers or small inland lakes. By design and construction, she was reasonably expected to ride out the ordinary perils of the sea, and did, in fact, in the usual course of operations, do so. The requirements of Section 672 that she have certificated personnel therefore applied to her, as she was a seagoing barge and was operated as such in exposed waters.

The Secretary of Commerce is authorized (33 U.S.C. § 151) to designate and define the lines dividing the high seas from rivers, harbors and inland waters. Pursuant to this statute, the line separating the high seas from inland waters at San Pedro Bay has been designated as follows:



“A line drawn from Los Angeles Harbor lighthouse through the axis of the new breakwater and extended in a straight line to the port of Long Beach.”

*Pilot Rules for certain inland waters of the Atlantic and Pacific Coasts and of the Coast of the Gulf of Mexico*, edition of May 28, 1940.

The Olympic operated at “Horseshoe Kelp,” some distance outside this line, and was violating the statute at the moment of collision.

The definition enacted by the Congress in 46 U.S.C. § 672c was drawn from an opinion of the Supreme Court of Massachusetts in

*Commonwealth v. Breakwater Co.*, 214 Mass. 10, 16, 100 N.E. 1034,

where the state sought to enforce a boiler-inspection law on a rock barge used in the construction of a breakwater. The court there held that if the barge was sea-going, it would be within the exclusive jurisdiction of the United States and not subject to the regulations of Massachusetts law, saying:

“The point of difficulty is whether it was ‘sea-going.’ No exact definition of this word has been given. In this connection, we think it means a barge, which from its design and construction with fair reason, in the light of all the history of ocean-going vessels, may be expected to encounter and ride out the ordinary perils of the sea, and which in fact does go to sea. If a vessel is not designed upon such a plan or constructed of such materials or with such skill as to warrant a reasonable belief that she is

staunch enough to venture upon the high seas, the mere fact that by selecting smoother waters and fair weather she is able on occasion to go there without mishap would not warrant the description of sea-going. But want of means of self-propulsion is not a conclusive test. She may still be sea-going if she is adapted to go by tow, and does so go upon the high seas."

The Olympic was 258 feet long, 38 feet wide, with a net tonnage of 1766 tons. She had served on the high seas for many years after being launched in Belfast, Ireland, in 1877, and, since her conversion into a fishing barge, had remained during the fishing season at her moorings in an exposed position on the high seas off Los Angeles harbor regardless of weather conditions.

**B. The Olympic Was Unseaworthy Because She Failed to Comply With the Requirements Imposed By the Inspection Service.<sup>11</sup>**

The applicable statutes are:

"\* \* \* The local inspectors shall, once in every year, at least, carefully inspect the hull of each sail

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(11) Assignment of Errors XV: "The District Court erred in finding that the minimum requirements specified for the Olympic II by the U. S. Local Inspectors of the Bureau of Marine Inspection and Navigation were not enforced and that the owners of the Olympic II were not obliged to comply with such minimum requirements prior to the time of the collision."

Id. XVI: "The District Court erred in finding that said minimum requirements imposed by the U. S. Local Inspectors of the Bureau of Marine Inspection and Navigation were a nullity and that they were without power or authority to impose the same."

Id. XVII: "The District Court erred in finding that the Olympic II was not a seagoing barge within the meaning or contemplation of Section 395 of Title 46 of the United States Code." (Ap. I, p. 253)

vessel of over seven hundred tons carrying passengers for hire and all other vessels and barges of over one hundred tons burden carrying passengers for hire within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in condition to warrant the belief that she may be used in navigation with safety to life. \* \* \*."

(46 U.S.C. § 391)

"The local inspectors of steamboats shall at least once in every year inspect the hull and equipment of every seagoing barge of one hundred gross tons or over, and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life. \* \* \*"

(46 U.S.C. § 395)

The Olympic is as clearly a seagoing barge within these statutes as within 46 U.S.C. § 672, et seq., supra. A large dredge in Los Angeles harbor has been held a seagoing barge within the meaning of the inspection statutes.

*City of Los Angeles v. United Dredging Co.* (1926),  
14 F. (2d) 364 (C.C.A. 9)

Moreover, the Olympic was within the definition of

"all other vessels and barges of over one hundred tons burden carrying passengers for hire"

of 46 U.S.C. 391, supra, and thereby also required to be inspected.

It will be noted that under the foregoing statutes the local inspectors

*"shall satisfy themselves* that such barge is of a structure suitable for the service in which she is to be employed, \* \* \* and is in a condition to warrant the belief that she may be used in navigation with safety to life."

In the exercise of this judgment, the local inspectors at Los Angeles determined upon certain requirements

*"which in the opinion of this Board must be complied with in order that non-self-propelled pleasure vessels may be suitable and safe for the purposes in which they are employed."*

They advised the master of the Olympic of these requirements. (Letter, June 3, 1940, Sakito Exhibit B, Ap. I, pp. 390, 391)

At the time of the collision, the Olympic had no inspection certificate. The requirement that the Olympic have

*"a sufficient number of transverse watertight bulkheads \* \* \* fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded"*

was not complied with. (Ap. II, pp. 747-749) The operation of the Olympic without the certificate required by the statute and without meeting the safety requirements of the local inspectors which were prerequisites for the issuance of such a certificate, was a violation of statute. The Olympic, in addition, did not meet the requirement



(Ap. I, p. 401) that she have a licensed master and a licensed engineer on board while persons other than the crew were on the ship.

“If any such barge shall be navigated without such certificate of inspection \* \* \* the owner shall be liable to a penalty of \$500 for each offense.”

(46 U.S.C. 398.)

Navigation, of course, means use within the service to which the vessel is devoted. The word is to be construed broadly to effectuate the purposes of the statute, namely, to promote the safety of human lives upon the ocean.

*United States v. Steam Tug Union*, (S.D.N.Y.) 1932  
A.M.C. 1331, 1336:

“In my judgment the purpose of the Act of 1908 is plain on its face—it is to insure safety in navigation. \* \* \* When this was the object, what is meant by ‘navigation’? In my judgment, it covers the time when the tug was engaged in business. A man is engaged in the business of selling goods though he may not be selling anything at the moment; a man is engaged in the business of digging holes though he may at the moment be taking a drink or changing tools.”

The above case held that the crew requirements of the local inspectors applied from the time the vessel’s crew stood by in the morning until they quit work at night, and was not limited to the period of movement of the vessel through the water.

The purpose of the statute requiring inspection of sea-going barges and the purpose of the local inspectors in formulating minimum safety requirements were to safe-



guard the lives of those on board such vessels at sea, regardless of whether the vessels were in motion. Certainly the passengers on the Olympic were in as great a danger consequent upon non-compliance with the safety requirements while the vessel was tied up as they would have been had they been on board when she was towed to her location.

“The term ‘navigation’ includes the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas. It includes the time and the manner of leaving port, equally with the course of sailing and the sail to be carried. For some purposes it includes a period when a ship is not in motion, as for instance when she is at anchor.” (45 C.J., p. 576)

These faults of the Olympic were inexcusable, and no attempt was made on the part of counsel for Hermosa to carry the burden of showing that they could not have contributed to the collision and loss.

*The Denali* (1940), 112 F.(2d) 952 (C.C.A. 9).

Application of this rule to the present case means that the Olympic must show, not that failure to have at least 65 percent of her deck crew of a rating not less than able seamen and the failure to have “a sufficient number of transverse water-tight bulkheads \* \* \* so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded”, and the failure to have licensed officers aboard, might not have contributed to the disaster, but that they *could not* have done so.

The testimony offered upon this point by libelant was that of Captain Wilver, who stated:

“\* \* \* I believe that, in the first place, if you strike a vessel that hard—I am still going to insist on hitting that is a hard blow, 23 feet—the decks would fall down. That would be the first thing would happen; and the whole structure of the vessel would collapse and render those bulkheads asunder.” (Ap. III, p. 1355)

Actually, on the Olympic without even the added strength bulkheads would have given her, nothing of the kind happened. The decks did not fall down. The whole structure did not collapse. Johnson, who was holding the rail a few feet from the point of impact, noticed no shock; (Ap. II, p. 562) he picked up his fishing tackle, walked around the nose of the Sakito Maru and over to the water taxi. (Ap. II, pp. 563-7) He just walked normally across the deck. (Ap. II, p. 563) Greenwood walked across the deck to the bow of the Sakito Maru. (Ap. II, p. 589) Ohiser walked from one side of the Olympic to the other. (Ap. II, p. 670) None of the witnesses who were aboard the Olympic following the impact reported any collapse of the deck or of “the whole structure of the vessel.”

In connection with the Olympic's unseaworthiness with regard to bulkheads, it should be remembered that negligence which causes or contributes to the *loss*, although not to the collision, is nevertheless a fault. In a limitation proceeding where the sinking of a vessel was due to negligence in taking her out among floating ice, the court stated:

“There was another act of negligence, contributory, no doubt, to the loss sustained, namely the large number of passengers who were permitted to board the boat and enter the cabin. \* \* \* While over-crowding was not the proximate cause of the disaster, it nevertheless was contributory to the drowning of at least some of the men in the cabin, for no one will doubt that if the boat had not been over-crowded, quite a number, how many of course is uncertain, would not have gone down with the foundered boat. It was a concurrent cause, and the owner, in my opinion, was not absolved from liability, even though not responsible for other causes.”

*The Linseed King* (1928), 24 F.(2d) 967, 972, 973; affd. 52 F.(2d) 129, and modified on other grounds, 285 U.S. 502, 76 L.ed. 903, 52 S.Ct. 450.

Admiralty texts and authorities clearly establish the rule that the condition of a vessel may be such as to be either the sole proximate cause of the loss she sustains as a result of the negligence of another or so contributory to her damage or loss as to involve her in mutual fault and necessitate a division of the damages to herself and others. Thus, in

*Wallace v. Johnson* (1913), 204 F. 440 (C.C.A.5) it is stated:

“The conclusion from the evidence is irresistible that the age and condition of the schooner greatly increased the extent and cost of repairs. It is clear that the force of the collision could not have been responsible for the collapse of her decks. \* \* \*

“We are firmly of the conviction that no such damage would have resulted to the *Jordan*, had she

been strong and staunch, and her owners must be held to some responsibility for the exposed position of the pilot boat."

*Roscoe Admiralty Jurisdiction and Practice* (5th ed.) p. 81:

"If a collision is occasioned by the fault of one vessel, it is not material in point of law which vessel strikes the other in the first instance, nor does mere impact give a cause of action unless damage results; *and if the object collided with in the course of navigation is not of proper strength to withstand ordinary pressure, the vessel doing the damage may escape liability.*"

*Marsden, Collisions at Sea* (9th ed.) p. 24:

"When the negligence is an immediate cause of the loss, it is material in an action to recover damages for that loss, although it is in no way a cause of the collision in which the loss occurred."

Not only did the Olympic fail to meet the burden of proving that her statutory faults *could not* have contributed to the collision and the loss, but she has failed even to prove that they probably did not so contribute. In fact, the preponderance of the evidence points inescapably to the conclusion that the fault of the Olympic in not having a competent and adequate crew of certified seamen was a contributing cause to the collision, and her failure to have proper bulkheads, required alike by the inspectors under statutory authority and by ordinary good seamanship, directly contributed to the consequent loss of life and property.



VII. THE NAVIGATION OF THE SAKITO MARU WAS IN ALL RESPECTS IN ACCORDANCE WITH THE RULES AND THE PRINCIPLES OF GOOD SEAMANSHIP.

A. Watch and Lookout.

There is not the slightest question that from 7 a. m., on until the collision, Captain Sato, Chief Officer Yokota, Apprentice Officer Kanda and Quartermaster Aono were continuously on the bridge. (Ap. II, p. 808; Ap. III, p. 1091; Ap. III, pp. 1288-90; Ap. III, p. 1290, 1291) Both the captain and the chief officer were keeping a lookout ahead, and the apprentice officer when not attending to other duties such as making time observations and entries in the scrap or memo log, was also keeping a lookout ahead. (Ap. II, 836, 837; Ap. III, pp. 1106-8, 1288-90)

At the time the fog signals started, apprentice sailor Yokoyama was engaged in cleaning the forecastle head. (Ap. II, pp. 838, 839; Ap. III, pp. 1292, 1293; id p. 1109) He stopped this work and acted as lookout until he was relieved by the A. B. sailor Shimada. (Ap. III, pp. 1292, 1293) At 7:09, Shimada megaphoned the presence of a vessel ahead to the bridge, and her loom was immediately picked up by the captain and the chief officer. (Ap. II, p. 839; Ap. III, p. 1113) Against the testimony of those who saw Shimada there and who acted upon his megaphoned warning is a mass of negative testimony of fishermen in small boats and other witnesses that they saw no lookout. If this testimony outweighs that of the Sakito Maru, it would be necessary to decide that each man on the deck of the Sakito Maru committed deliberate perjury. The District Court, who heard the lay witnesses and



only Captain Sato of the Japanese vessel, declined to find that no lookout was maintained. (Ap. I, p. 124)

The trial court did, however, in virtue of his determination that visibility was at least 1800 feet, find that the Sakito's lookout was inefficient. Error is assigned as follows:

“The District Court erred in finding that the lookout aboard the Japanese Motor Vessel Sakito Maru was inefficient or in fault in any respect.” (Ass. of Err. XXIII, Ap. I, p. 254)

This contrary finding must necessarily fall if visibility is determined to be approximately 200 meters. The lookout himself testified that after taking his position and relieving Yokoyama a little after 7:03, he looked on both sides and ahead until he saw the Olympic. (Ap. II, p. 947)

#### **B. Fog Signals.**

We have already pointed out above that the only reason why the attention of nearly every witness was called to the approach of the Sakito Maru was the sound of her fog whistle. The testimony of the Sakito is that such whistle was being sounded in blasts of proper duration at intervals to comply with the rules. (Ap. II, p. 819; id. pp. 837, 838; Ap. III, pp. 1105, 1106) It is no more surprising that some witnesses may have heard only one or two whistles than that they should have missed the two occasions of “just about a few minutes” when Ohiser testified the barges did not ring their bells.

C. The Sakito Maru Was Proceeding at a Speed Which, in the Discretion of Her Master, Having Regard to the Conditions He Observed, Seemed Moderate.<sup>12</sup>

We have already noted the decision in *The Beaver* and *The Selja* for the proposition that the portion of Article 16 dealing with speed in fog is a direction calling for use of discretion;

*Lie v. San Francisco & S. Co.* (1917), 243 U.S. 291,  
37 S. Ct. 279, 61 L. ed. 726;

and the decisions in

*The Old Reliable*, 269 F. 725 (C.C.A.3); and  
*The A. P. Skidmore*, 115 F. 791 (C.C.A.2),

that the test of care is the action taken under the conditions observed which call for its exercise.

The district court concluded that the speed of the Sakito Maru approaching the Olympic exceeded considerably the speed of 6 - 6½ knots testified to by her master, confirmed by her engine room records, but disputed by argumentative calculations and estimates of witnesses. Accordingly, we shall deal with that problem here. (Ass. of Err. XVIII, XXI, Ap. I, pp. 253, 4)

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(12) This matter already received some attention in subdivision IV hereof. The applicable Assignments of Error are: "XVIII. The District Court erred in finding that the Japanese Motor Vessel Sakito Maru was proceeding at an immoderate speed at the time of and prior to the collision." (Ap. I, p. 253) "XX. The District Court erred in finding that at 7:09 o'clock A.M. the Sakito Maru was proceeding at not less than 8 miles per hour and in not finding that at this time the Sakito Maru was proceeding at not more than 6½ knots per hour." (Ap. I, pp. 253-4) "XXI. The District Court erred in finding that at 7:03 o'clock A.M. the Sakito Maru was 9120 feet distant from the Olympic." (Ap. I, p. 254)

Since 7:06, and at the time the Olympic was sighted at 7:09, Captain Sato testified that the speed of the Sakito, as the engines were set slow ahead, was  $6\frac{1}{4}$  -  $6\frac{1}{2}$  miles per hour. (Ap. III, p. 1107) Chief Officer Yokota testified that the speed of the vessel during this period was 6 to  $6\frac{1}{2}$  miles per hour. (Ap. II, p. 838) These estimates of speed were given by the master and the chief officer of the Sakito, both of whom were highly competent and qualified mariners of many years experience. (Ap. II, p. 803; Ap. III, p. 1085) They are the ones most familiar and conversant with the characteristics of their own vessel, including her speed. They testified to the immediate response they got on all orders to the engine room and the physical manipulations required to place the engines slow ahead and to reverse them were explained in detail by Chief Engineer Kato. (Ap. II, p. 841; pp. 915-29; Ap. III, pp. 1286, 1287; id. pp. 1293, 1294) There is nothing in this testimony to create even a vagrant notion that the Sakito Maru was, on September 4, 1940, an ill-manned, equipped or navigated vessel, or that any of her officers or crew was not alert or attentive to his duties.

A man of practical experience as a mariner knows that it is difficult and practically impossible to estimate the speed of an approaching vessel. Mr. Collins, who is the master of a salvage tug and who is engaged in the salvage and general towing business, has spent most of his time, since he first acquired a boat of his own in 1906, on the waters of Los Angeles harbor. He holds both an operator's and a pilot's license for San Pedro and Long

Beach. He testified that he did not think anyone could tell what the speed of the Sakito was by simply looking at the bow of the vessel as she approached. (Ap. III, pp. 1064, 1065)

As we have seen, before the Olympic was sighted by the Sakito, Captain Sato believed that visibility extended for about 300 meters. Chief Officer Yokota was of the opinion that at this time visibility extended for 500 to 600 meters.

Captain Sato testified that, loaded as the Sakito was at that time, and proceeding with her engines at slow ahead as they were at the time, and with the vessel making a speed of  $6\frac{1}{4}$  to  $6\frac{1}{2}$  knots per hour, as she was at that time, the Sakito could be brought to a complete stop by putting the engines full astern within 250-300 meters, or  $1\frac{1}{2}$  to 2 of her lengths. (Ap. III, p. 1140; id. p. 1243) Chief Officer Yokota estimated that under these conditions the Sakito could be brought to a complete stop by putting her engines full astern within a distance of 300 meters. (Ap. II, p. 908) This evidence by Captain Sato and Chief Officer Yokota, who certainly are the most qualified to speak with reference to the subject, is uncontradicted.

Article 16 of the International Rules provides, in part, as follows:

“Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. \* \* \*”

(33 U.S.C. § 92)



While off-hand it might appear that a vessel which collides with a fixed structure has twice the distance within which to avoid a collision as that which would be in her grasp in case of a moving vessel approaching her end on, this is by no means a demonstration that in fog a vessel colliding with a fixed structure is at fault. It must be borne in mind that in the case of two moving vessels, the avoidance of collision in such situation is a partnership proposition. Each can take proper steps on sighting the other when the steering and sailing rules begin to apply. In approaching a breakwater or a fixed object like the Olympic and her chains spread out upon an unnatural heading across her course, the Sakito had to play a lone hand. The length of the obstruction was great; it was not headed into the wind, but was upon an unpredictable heading across the course of the wind and maintained in a condition of helplessness. In this situation, we submit that the fault of Captain Sato in misjudging the distance he could see ahead in a variable fog, if a fault, was a venial one, and the major faults of the Olympic II the sole proximate cause of the collision.

We have already made reference to the decisions of *La Bourgogne*, 86 Fed. 475, certiorari denied 172 U.S. 646, *The Benjamin A. Van Brunt*, 98 F. 131 (C.C.A.1), *The Kennebec*, 108 Fed. 300 (C.C.A.2) and *The Kungsholm*, 1938 A.M.C. 1334, wherein the moving vessel was held not to be responsible. If it be thought that the estimates of Captain Sato and his chief officer that the Sakito reduced her speed from approximately 16 knots to 6 - 6½ knots between 7:03 and 7:06 upon a change from full to slow ahead represent an unusually fast deceleration,



nevertheless it can scarcely be doubted that the vessel had decelerated that much before 7:09 when the Olympic was first seen.<sup>13</sup> In such circumstances, if the speed at 7:09 was moderate under the observed conditions, previous speed is not a material factor except as it might have permitted those aboard the Sakito to hear one signal more of the Olympic if it was being sounded.

*Dollar Steamship Line v. Matson Nav. Co.* (1928)  
23 F. (2d) 554, 556 (C.C.A.9) cert. denied 278  
U.S. 598.

It is held under the second paragraph of Article 16 that a vessel's navigators may be excused for failure to locate direction of sound in a fog and, therefore, for failure to stop on hearing signals which, though coming from forward of the beam, were actually heard in a different direction. And so in

*Steffens v. United States* (1929) 32 F. (2d) 206,  
208 (C.C.A.2),

Judge Learned Hand stated:

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(13) The trial court's determination that the Sakito was 9120 feet distant from the Olympic at 7:03 must necessarily have been made by projecting her course from her last good fix at 5:58 a. m. (Ap. III, p. 1195) at her admitted speed for that period. While Captain Sato testified generally that at full ahead his vessel had an "over the ground" speed of 16 knots (Ap. III, p. 1087), it is obvious from the entire testimony that such speed was fixed without reference to other factors such as currents and wind, and these factors were not brought to his attention when such answer was given. It is undisputed that the Sakito was heading into a northeast wind of force 1. (Ap. II, p. 824) The record as to current is meagre, but Johnson, fishing from the port or seaward side of the Olympic, testified that the surface current was seaward and a little to his right. (Ap. II, pp. 567-8) Accordingly, we do not think nice calculations based upon a fix 65 minutes earlier can be considered to establish a position of 9120 feet from the Olympic at 7:03 and immoderate speed thereafter.

“We read the rule as imposing an absolute duty only when the ship believes that the signal comes from ahead.”

Applying this principle to the first paragraph of Article 16, we submit that, since the Sakito was so navigated as to be able to avoid collision with the Olympic if seen within the distance her officers estimated visibility to extend, there was no fault of the Sakito. We further submit that, in fixing a moderate speed, the Sakito was entitled to assume that she would be afforded warning by fog signals as a substitute for sight, and that if these had been properly sounded, they would have been heard by those on board the Sakito.

#### **D. The Maneuvers of the Sakito Before and After the Collision Were Proper.**

##### **(a) Maneuvers before the collision.**

The maneuvers of the Sakito before the collision and after the Olympic was sighted were skillful and in conformity with all practices of good seamanship. The testimony of all the witnesses on the Sakito who saw the Olympic before the impact is unanimous to the effect that the Olympic lay approximately dead ahead at right angles. Captain Sato so testified. (Ap. III, pp. 1230-32) Chief Officer Yokota so testified. (Ap. II, p. 840) Shimada, the lookout at the bow, testified that the Olympic might not have been exactly at right angles. (Ap. II, pp. 948, 949) Stiles, for libellant, however, aboard the Olympic, and apparently the first man to appreciate *the grave danger* to her, saw the Sakito's *entire star-board side* 100 to 150 yards away. (Ap. II, p. 717) The

Sakito's mechanical course recorder, showing a heading of  $340^{\circ}$ , is unimpeachable. (Ap. II, p. 856, Exhibit J) The course recorder demonstrates that the heading of the Sakito changed from  $340^{\circ}$  true to  $350^{\circ}$  true before the impact. This was a change in heading of only  $10^{\circ}$ . It is to be remembered in this connection that even though the change of heading might take place immediately following the change in the rudder, the vessel would proceed in her previous path for a considerable distance before she would start to move out of her tracks in the direction of the rudder. (Ap. III, pp. 1255-8) Captain Sato also testified that if the rudder had not been changed and the Sakito had continued on the course she was on when the barge was sighted, the stem of the Sakito would have struck the Olympic only a few feet farther forward than the actual point of impact. (Ap. III, p. 1257) The order "hard astarboard" was given by Captain Sato because it is an instinctive policy to turn to the right when an object is sighted ahead. (Ap. III, p. 1119) At the time the order was given, he thought it was possible the Sakito might clear the barge by this maneuver. (Ap. III, pp. 119-20)

The court will recall that the Olympic was tied up so that her heading would be due west and that Captain Anderson testified that she would swing about one point in either direction. She was ballasted to such a degree that she would be more likely to be windrode than tide-rode. (Ap. II, p. 777)

*The West Cherow* (1921), 276 Fed. 585 (E.D.Va.)

Accordingly, if the northeast wind had swung the Olympic

about a point, or  $10^{\circ}$ , to port, and her heading was  $260^{\circ}$  at the time of the collision, and that of the Sakito  $350^{\circ}$ , as the master of the latter testified, the angle of collision would be exactly a right angle. In this connection it must be borne in mind that the Olympic's draft aft was 16.6 feet, and forward only 15 feet. (Ap. II, p. 740)

The "hard astarboard" was a logical and correct order both under Article 18 and under the starboard-hand rule declared in Article 19 of the International Rules. (33 U.S.C.A., secs. 103, 104) Captain Sato's orders of "hard astarboard" and "reverse" at 7:09, when the Olympic was sighted, were calculated to avoid a collision if anything could do so. At the time the order was given, Captain Sato knew the barge's heading was to the port of the Sakito. (Ap. III, p. 1227)

In view of the testimony contained in the record which has been mentioned above, there is no room for argument concerning the fact that the maneuvers of the Sakito before the collision and after the barge was sighted were proper and in accordance with the best principles of seamanship.

**(b) Maneuvers after the collision.**

The maneuvers of the Sakito after the collision have been challenged, but when an analysis is made of all of the evidence and testimony, it is apparent that the Sakito's maneuvers at this time were also proper and beyond criticism. There can be no doubt that the propellers of the Sakito were going astern at the time of the impact. This is the uncontradicted testimony of the officers of



the Sakito substantiated by the log entries. (Ap. II, p. 841; Olympic's Exhibit 13; Ap. III, p. 1186) This is also confirmed by the testimony of Collins, who, because of his experience with Diesel engines, detected a denser smoke coming from the stack of the Sakito as she approached the Olympic, indicating her engines were full astern. (Ap. III, p. 1064)

At the time of the impact, Captain Sato estimated the speed of the Sakito at about 1 to  $1\frac{1}{4}$  knots (Ap. III, p. 1125) Chief Officer Yokota estimated the speed at this time at a mile and a half or two miles. (Ap. II, p. 844) As closely as Captain Sato could fix it, the Sakito moved ahead and shoved the Olympic through the water for a distance of 20 to 30 meters before the Sakito came to rest. (Ap. III, p. 1125) The impact caused the Olympic to list somewhat to starboard,  $15^{\circ}$  or more. (Ap. I, pp. 439-40; Ap. II, p. 591; Ap. III, p. 1067) When the Sakito's headway was checked, the port side of the Olympic settled and dropped down from the raked bow of the Sakito and the momentum of the Olympic continued until the barge also came to rest. These factors caused the two vessels to separate, and were described by several witnesses. Mr. Harris gave a clear account of it. (Ap. II, pp. 517-18) Mr. Collins also closely observed and followed the movements of the two vessels after the impact. (Ap. III, pp. 1067-8))

It was not until after the two vessels had separated that the Sakito's engines, stopped at 7:11, were again put astern at 7:13. Thus, the engines were put full astern when the barge was sighted at 7:09, the collision occurred



at 7:10½, and the engines were stopped at 7:11. (Ap. II, pp. 826, 7) The engines were next put astern at 7:13, and this was after the two vessels had separated because of the factors previously described. (Ap. III, p. 844)

Captain Sato and Chief Officer Yokota described in detail why it was impractical and dangerous, after the two vessels had separated, for the former to put the engines ahead and attempt to wedge the bow in the hole in the port side of the Olympic. The probable serious consequences and difficulty of such a maneuver were described by them. (Ap. II, pp. 909-10; Ap. III, pp. 1131-32)

After the two vessels had separated and the Sakito's engines were put astern at 7:13, the vessel backed a distance of about 100 meters so that it would be safe to drop her anchor, and a life boat was lowered as soon as the vessel came to rest. The anchor was dropped at 7:17, the vessel's motion checked and her engines stopped at 7:19, and the life boat lowered into the water at 7:20. (Ap. III, pp. 1131, 1136, 1137)

These maneuvers of the Sakito, both before and after the collision, were directed by a trained, highly qualified and experienced officer. Captain Sato, who gave such orders, was on the bridge of the Sakito Maru. He knew her characteristics and maneuverability and observed the conditions as they existed at the time. He judged the propriety of each maneuver in the light of existing conditions as guided by his apperception. Admiralty courts have frequently refrained from substituting their judgment on such matters for that of a master. We do not

note in the record of these proceedings attributes of any person's judgment upon the matters under discussion which indicate a judgment superior to that of Captain Sato.

*The M. M. O'Brien* (E.D.N.Y.) 1932 A.M.C. 996, 998;

*The Harold* (1922) 287 F. 757, 758 (S.D.N.Y.);

*The Mary T. Tracy* (1925) 8 F. (2d) 591, 593 (C.C.A.2);

*The Clarence L. Blakeslee* (1917) 243 F. 365, 366 (C.C.A.2);

*The Nannie Lamberton* (1898) 85 F. 983, 984 (C.C.A.2).

VIII. THE DOCTRINE OF "LAST CLEAR CHANCE" COULD IN NO EVENT BE APPLICABLE SINCE THE SAKITO MARU DID NOT SEE THE OLYMPIC'S POSITION OF PERIL IN TIME TO AVOID HER.

In holding that the Sakito Maru might be held liable notwithstanding the fault, if any, of the Olympic, because she *ought* to have seen the Olympic, and, therefore, *had* the last clear chance to avoid the loss (Ap. I, pp. 137, 8), the trial court has mutilated the fundamentals of that doctrine. (Ass. of Err. XXV, Ap. I, p. 254)<sup>14</sup>

It is rudimentary that the last-clear-chance doctrine comes into play only when the respondent is aware of

(14) "The District Court erred in finding that even if the Olympic II and her owners might be at fault, the Sakito Maru, by the exercise of reasonable care and prudence, could have avoided the collision and is therefore chargeable with sole fault for the collision and the resultant loss of life, personal injuries and property damage."

the libelant's self-imposed situation of danger. It assuages the rigors of the doctrine of contributory negligence where the other party is aware of the danger and can, but does not, take steps to avoid it. It has no application where the party charged has not observed the other's position and the negligence of each continues to the time when accident is unavoidable. *Scienter* is, in such cases, indispensable to the application of last clear chance, for without it the other party has no chance to avoid the consequences of the continuing negligence of the injured party.

*Chunn v. City & Suburban R. Co.* (1907) 207 U.S. 302, 52 L. ed. 219, 222, 28 S. Ct. 63;

*Nielsen v. Richman* (1940), 114 F. (2d) 343, 350 (C.C.A.8), cert. den. 311 U.S. 705;

*Sprinkle v. Davis* (1940), 111 F. (2d) 925, 928 (C.C.A.4);

*Arnold v. S. F. etc. Ry. Co.* (1917), 175 Cal. 1, 164 Pac. 798.

The holding that the last-clear-chance doctrine might be invoked to excuse negligence of the Olympic, which continued to the very moment of collision although those on the *Sakito Maru* did not see her, was, we submit, clearly erroneous. Under the facts supposed by the trial court, there was a pure case of concurrent negligence.

## CONCLUSIONS.

We respectfully submit that the faults of the Olympic II were so gross and manifold that it was error to absolve her from fault for the collision. We further submit that such faults were of such major significance that any fault which might be found against the Sakito Maru would be of insufficient stature to inculcate her. Accordingly, we respectfully request that the decree of the district court herein be reversed in its entirety, or that, if this court shall conclude that any substantial fault of the Sakito Maru contributed to the collision and loss, said decree be modified to one of mutual fault.

Respectfully submitted,

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